INVESTIGATION REPORT

LETTING OF MARKET STALLS BY AUCTION

APRIL 2005

Office of The Ombudsman

Hong Kong

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EXECUTIVE SUMMARY

Direct Investigation on Letting of Market Stalls by Auction

Background

In Hong Kong, there are 104 public markets providing some 15,500 market stalls. These markets were previously managed by the Urban Services Department and the Regional Services Department. Since 2000, the Food and Environmental Hygiene Department ("FEHD") has taken over.

2. Public market stalls are usually let by auction. In the course of complaint handling, we noted that the arrangements for auction carry opportunities for abuse. A tenant may set out to outbid competitors to secure nearby stalls, then terminate the tenancy prematurely, thereby eliminating or reducing competition. As stalls vacated shortly after an auction are not auctioned again until three to five months later, the same bidder may repeat such tactics and thus enjoy a *de facto* monopoly. This is unfair to other bidders and particularly to patrons of the market. After preliminary inquiries into the administrative arrangements of FEHD for letting public market stalls, The Ombudsman decided to initiate a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397. In a press conference held on 4 November 2004, The Ombudsman declared this direct investigation.

The Ambit

3. The ambit of this direct investigation is:

(a) to examine administrative arrangements for letting public market stalls by auction;

(b) to identify loopholes, if any, that open up opportunities for abuse; and

(c) to suggest measures for preventing abuse.

Award of Tenancy

4. Under section 6 of the Public Markets Regulation, Cap. 132, the Director of Food and Environmental Hygiene ("DFEH") may let public market stalls at such rent and subject to such terms and conditions as he may determine.

Auction

5. Letting by auction is a long-standing practice. The final bidder is required to take up the tenancy of the stall for a term, usually of three years, by signing an agreement on the spot. He has to pay a deposit (equivalent to one month's rent) and the rent in advance for the quarter in which the tenancy commences (or the remainder of the quarter). In a few markets, rents are paid monthly.

6. This is how members of the public enter into tenancies of public market stalls. However, close relatives of existing tenants may do so through transfer or succession and itinerant hawker licence (IHL) holders through an IHL selection exercise.

Transfer or Succession

7. A tenant may transfer the tenancy to his parents, spouse or children on justifiable grounds such as illness.

8. Upon the death of a tenant, his spouse, offspring or nominated successor may apply for succession to the tenancy.

IHL Selection Exercise

9. It is Government policy to phase out IHL holders not by compulsory deletion, but by natural attrition. To encourage IHL holders to give up their licences, FEHD accords priority in letting public market stalls to those willing to surrender their licences. All vacated market stalls first go through a two-stage IHL selection exercise. In the first stage, FEHD will collate returns from districts on available market stalls and then conduct a quarterly restricted ballot. Invitation letters are sent to all (around 800) existing IHL holders. Those interested are required to return a ballot form.

10. Naturally, some stalls are more attractive than others. IHL holders entering the ballot may be interested only in these more attractive stalls. Those who fail to draw an early lot may, therefore, not choose at all.

11. The remaining stalls will then enter the second stage of the selection exercise. FEHD will display a list of the stalls for selection by IHL holders on a first-come-first-served basis. Stalls that remain vacant will be openly auctioned.

12. Arrangements for the IHL selection exercise including collating returns on available stalls, inviting participants and awaiting the next ballot, span over three to five months. Consequently, a stall will not be available for auction again until three to five months after it becomes vacant.

Termination of Tenancy

13. A tenancy normally lasts for three years but may be terminated prematurely by either party. FEHD may do so if a tenant breaches a tenancy condition or commits an offence. Tenants terminated under these circumstances will be banned from bidding for public market stalls for one year.

14. Tenants who fail to settle outstanding rents also breach tenancy conditions. FEHD may terminate their tenancies and not accept their bids until the rent in arrears has been paid.

15. FEHD exercises its power of terminating tenancies with care. A serious breach (such as selling meat not supplied by approved source) will lead to immediate termination. Otherwise, only breach repeated over a period of time will result in premature termination.

16. A tenant may terminate the tenancy prematurely by giving one-month written notice. No reason is required and there is no minimum period within which the tenancy cannot be terminated without penalty. In such case, the tenant pays rent for one month, leaves upon expiry of notice, gets back the one-month deposit and any unexpended rent. The stall is then left vacant.

17. Failure to give notice to quit will result in forfeiture of the deposit. However, the tenant may still be refunded the unexpended rent. Again, this will cost him a sum equivalent to only one month's rent.

18. All stalls vacated will become available for the next two-stage IHL selection process and auction. This usually means a gap of three to five months

19. In other words, the current system for termination of tenancy allows an existing tenant to "excise" a nearby stall from competition for up to six months at just one month's rent.

Case Studies

20. To check if there have been instances of irregularity, we examined cases where tenancies were terminated shortly after commencement. We found that since 2001, there had been 213 cases of tenancy being terminated within 12 weeks. We have identified and studied some suspect cases which involved three bidders.

Observations and Opinions

21. We see auctioning as a fair and open means for opening up business opportunities in public markets. At the same time, it maximises public revenue. Regrettably, the FEHD

procedures have loopholes for unethical elements to advance their self interests, causing inequity to competitors and to patrons of public markets.

Award of Tenancy

22. Due to the need for giving priority to IHL holders, a stall becoming vacant will not be available for auction for months. This in effect means depriving prospective competitors of business opportunities and denying patrons a fuller choice of goods. It also results in less revenue for the public purse.

23. We accept the policy for priority to IHL holders. However, we see room for improvement in the arrangements. FEHD should cut considerably the time for processing a vacated stall to be auctioned. It should not need to take three to five months (para. 12).

24. By natural attrition, the number of IHL holders decreases with the passage of time. Eventually, there will be few remaining IHL holders, who may not be interested in trading in their licences for tenancies of public market stalls. FEHD should, therefore, review the return rate of ballot forms and consider when it will be appropriate to revise the policy for priority to IHL holders. It may, for instance, consider placing the onus on the IHL holders to indicate interest in trading in their licences.

Termination of Tenancy

25. A tenancy binds FEHD for three years unless the tenant is found to have breached tenancy conditions or committed an offence (para. 13). However, it makes it easy for the tenant to quit (para. 16): the tenant need not justify premature termination and there is no penalty to deter wilful termination. This is not a fair balance of all the interests concerned: prospective bidders, market patrons and FEHD/Government. Furthermore, it breeds abuse. A tenant can drive competitors away for up to six months at a cost of only one month's rent (para. 19).

26. FEHD should, therefore, set a minimum period in the tenancy agreement for market stalls during which termination will attract a penalty payment. To allow flexibility, FEHD should review from time to time the need to provide for genuine exceptional circumstances under which a tenancy may be terminated prematurely without penalty payment. This should deter *mala fide* bidding.

27. FEHD should pay particular attention to cases of early termination, whether within or after the minimum period, and keep proper records for reference.

Notice of Termination

28. FEHD should consider requiring a larger deposit or longer notice for premature termination. This would further increase the cost of early termination and should deter abuse. To

shorten the period of vacancy, FEHD should also activate the relevant procedures (para. 12) as soon as notice is received.

Ban on Bidders

29. FEHD should impose restrictions in future auctions on tenants who terminate their tenancies early, as it does for tenants who have breached tenancy conditions or committed offences (paras. 13 to 15).

Recommendations

30. The cases examined show that abuse in auctioning for market stalls should have become evident much earlier. We are surprised that other than a single attempt to tackle a case of blatant abuse, FEHD has not formulated any strategy or action plan to plug loopholes in the procedures or to tighten control over the system.

31. Against this background, unethical bidders have taken unfair advantage of the rules laid down by FEHD. It is imperative that FEHD review the arrangements and procedures for auctioning public market stalls.

32. The Ombudsman has made the following recommendations to the Director of Food and Environmental Hygiene:

(a) Award of Tenancy

i) in anticipation of the natural attrition of remaining IHL holders, review the return rate of ballot forms: para. 24;

ii) consider when it will be appropriate to revise the policy for priority to IHL holders in the selection of vacant market stalls: para. 24;

iii) cut considerably the lead time for preparing for auctions of vacant stalls: paras. 22 to 23;

(b) Termination of Tenancy

Minimum Period

i) review the terms of the tenancy agreement to set a minimum period, within which tenancies could be terminated only on a penalty payment: paras. 25 to 26;

ii) inform bidders of such minimum period and penalty payment for early termination: paras. 26 to 27;

iii) to allow flexibility, review from time to time the need to provide for genuine exceptional circumstances under which a tenancy may be terminated prematurely without penalty payment: para. 26;

iv) keep proper records on tenants who have applied for premature termination: para. 27;

v) review the period for longer notice of termination: para. 28;

vi) review the deposit for a larger amount: para. 28;

Ban on Bidders

vii) establish mechanism to impose restrictions in future auctions on tenants who have previously applied for premature termination: para. 29; and

viii) consider sanctions on bidders found to have abused the system in our case studies: para. 29.

Comments from FEHD

33. FEHD has accepted our recommendations. Implementation of some of them is already underway.

Final Remarks from The Ombudsman

34. The Ombudsman is grateful for FEHD's cooperation throughout the investigation, the prompt and positive response to our findings and the readiness to implement our recommendations. She thanks DFEH and his staff for their assistance in the study.

Office of The Ombudsman
Ref. OMB/DI/127
April 2005

1

INTRODUCTION

BACKGROUND

1.1 In Hong Kong, there are 104 public markets providing some 15,500 market stalls. These markets were previously managed by the Urban Services Department and the Regional Services Department. Since 2000, the Food and Environmental Hygiene Department ("FEHD") has taken over.

1.2 Public market stalls are usually let by auction. In the course of complaint handling, we noted that the arrangements for auction carry opportunities for abuse. A tenant may set out to outbid competitors to secure nearby stalls, then terminate the tenancy prematurely, thereby eliminating or reducing competition. As stalls vacated shortly after an auction are not auctioned again until three to five months later, the same bidder may repeat such tactics and thus enjoy a *de facto* monopoly.

1.3 As this is unfair to other bidders and particularly to patrons of the market, this Office conducted preliminary inquiries into the administrative arrangements of FEHD for letting public market stalls. On 19 October 2004, The Ombudsman informed the Director of Food and Environmental Hygiene

("DFEH") that she had decided to initiate a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397. In a press conference held on 4 November 2004, The Ombudsman announced this direct investigation.

PURPOSE AND AMBIT

1.4 The ambit of our investigation is:

(a) to examine administrative arrangements for letting public market stalls by auction;

(b) to identify loopholes, if any, that open up opportunities for abuse; and

(c) to suggest measures for preventing abuse.

METHODOLOGY

1.5 We have studied and analysed information provided by FEHD including administrative procedures, statistical data and cases of prematurely terminated tenancies. We held discussions with FEHD representatives throughout the investigation. In a meeting held on 11 March 2005, FEHD's Deputy Director (Environmental Hygiene) and our Assistant Ombudsman

discussed our observations and recommendations.

1.6 Members of the public were invited to give comments and suggestions from 4 November to 3 December 2004.

INVESTIGATION REPORT

1.7 A draft investigation report was sent on 1 March 2005 to DFEH for comments. These were received on 17 March 2005. This final report was issued on 1 April 2005.

2

LETTING OF MARKET STALLS

AWARD OF TENANCY

Auction

2.1 Under section 6 of the Public Markets Regulation, Cap. 132, DFEH may let public market stalls at such rent and subject to such terms and conditions as he may determine.

2.2 Letting by auction is a long-standing practice. Auctions of public market stalls in the urban area are held monthly while auctions of those in the New Territories and Islands every two months. Any Hong Kong citizen of 18 or above may bid for a stall. The number and location of stalls to be let, their designated trade, ground rules of the auction and arrangements for successful bidders are set out in the auction notice. A sample of the notice is at **Annex 1**.

2.3 The upset price of a stall for auction is set at the open market rent

assessed by the Rating and Valuation Department. If no bidder responds, the stall will be withdrawn. Towards the end of an auction, stalls withdrawn will be put up again for bidders failing to get their favoured stalls earlier to reconsider bidding alternative stalls.

2.4 For a stall where the upset price is answered, interested bidders call out their bids progressively. When a bid is unlikely to be advanced upon, the auctioneer will call out the latest bid three times. At the fall of the hammer, the bid is final and becomes the monthly rent to be charged.

2.5 The final bidder is required to take up the tenancy of the stall for a term, usually of three years, by signing an agreement on the spot. He has to pay a deposit (equivalent to one month's rent) and the rent in advance for the quarter[1] in which the tenancy commences (or the remainder of the quarter).

2.6 This is how members of the public enter into tenancies of public market stalls. Close relatives of existing tenants and itinerant hawker licence ("IHL") holders may, however, do so through other means:

- by transfer or succession; and
- by an IHL selection exercise.

Transfer or Succession

2.7 A tenant may transfer the tenancy to his parents, spouse or

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1 In a few markets, rents are paid monthly.

children. He must, however, justify the transfer with reasons such as illness and old age (not applicable to transfer to natural parents).

2.8 Upon the death of a tenant, his spouse, offspring or nominated successor may apply to FEHD for succession to the tenancy.

IHL Selection Exercises

2.9 It is Government policy to phase out IHL holders not by compulsory deletion, but by natural attrition. To encourage IHL holders to give up their licences, FEHD accords priority in letting public market stalls to those willing to surrender their licences[2]. All vacated market stalls first go through an IHL selection exercise with an offer of concessionary rental arrangements: in the first three years, the rent payable is equivalent to their IHL licence fees, some $1,000 per annum for a small stall or 50% of the open market rent for a large stall.

2.10 The selection exercise is conducted in two stages. In the first stage, FEHD will collate returns from districts on available market stalls and then conduct a quarterly restricted ballot. Invitation letters are sent to all (around 800) existing IHL holders. Those interested are required to return a ballot form to FEHD. These IHL holders, representatives from hawker associations, the Independent Commission Against Corruption and the Home Affairs Department are invited to witness the ballot; which determines the

[2] IHL holders not interested in market stalls may surrender their licences in exchange for a one-off *ex gratia* payment of $30,000 or selection of a vacant hawker fixed pitch. The option is, however, offered to IHL holders for only five years from 1 January 2003 to 31 December 2007. After that, the offer will lapse.

order in which the IHL holders select their stalls.

2.11 Naturally, some stalls are more attractive than others. IHL holders entering the ballot may be interested only in these more attractive stalls. Those who fail to draw an early lot may, therefore, not choose at all.

2.12 The remaining stalls will then enter the second stage of the selection exercise. FEHD will display a list of the stalls for selection by IHL holders on a first-come-first-served basis.

2.13 Stalls that remain vacant will be openly auctioned in the manner described above (paras. 2.2 to 2.5).

2.14 Arrangements for the IHL selection exercise including collating returns on available stalls, inviting participants and awaiting the next ballot, span over three to five months. Consequently, a stall will not be available for auction again until three to five months after it becomes vacant.

TERMINATION OF TENANCY

2.15 A tenancy normally lasts for three years and is renewable. It may, however, be terminated prematurely by either party. FEHD may do so if a tenant breaches a tenancy condition (such as selling goods other than those designated or selling chilled or frozen meat as fresh meat) or commits an

offence (such as selling meat not supplied by approved source or causing obstruction to passageway). Tenants whose tenancies are terminated under these circumstances will be banned from bidding for public market stalls for one year.

2.16 Tenants who fail to settle outstanding rents also breach tenancy conditions. FEHD may terminate their tenancies and not accept their bids until the rent in arrears has been paid.

2.17 FEHD exercises its power of terminating tenancies with care. A serious breach (such as selling meat not supplied by approved source) will lead to immediate termination. Otherwise, only breach repeated over a period of time will result in premature termination[3].

2.18 A tenant may terminate the tenancy prematurely by giving one-month written notice. No reason is required and there is no minimum period within which the tenancy cannot be terminated without penalty. In such case, the tenant pays rent for one month, leaves upon expiry of notice, gets back the one-month deposit and any unexpended rent. The stall is then left vacant.

2.19 Failure to give notice to quit will result in forfeiture of the deposit. However, the tenant may still be refunded the unexpended rent. Again, this will cost him a sum equivalent to only one month's rent.

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[3] For a tenant selling goods other than those designated, for instance, FEHD will only issue a warning letter. Only when three warning letters have been issued within a period of six months will FEHD terminate the tenancy.

2.20 All stalls vacant will become available for the next two-stage IHL selection process and auction. This usually means a gap of three to five months (para. 2.14).

2.21 In other words, the current system for termination of tenancy allows an existing tenant to "excise" a nearby stall from competition for up to six months at just one month's rent.

2.22 To check if there have been instances of irregularity, we examined cases where tenancies were terminated shortly after commencement. We found that since 2001, there had been 213 cases of tenancy being terminated within 12 weeks. We have identified and studied some suspect cases. They are summarised in Chapter 3.

3

CASE STUDIES

3.1 Suspect cases studied involved three bidders.

Bidder A

3.2 Bidder A was the tenant of four stalls. His relative held another stall in the same market. These five stalls were close to a vacant Stall X for the same designated trade.

3.3 From 10 April 2002 to 19 August 2003, Stall X came up in four auctions. Bidder A took part in every auction, outbidding competitors for Stall X on each occasion. Then each time shortly after taking up the tenancy, he would terminate it.

Auction	Upset price	Final bid	Termination time
10 April 2002	$4,000	$8,500	15 days
13 August 2002	$4,000	$9,000	13 days

10 December 2002	$4,000	$9,000	20 days
19 August 2003[4]	$3,500	$9,000	12 days

Bidder B

3.4 Bidder B was the registered assistant of a stall. In the same market, Stall Y of the same designated trade was vacant. From 27 October 2003 to 24 June 2004, three auctions for it were held. Bidder B took part in every one of them. On each occasion, he made the highest bid for Stall Y and took the tenancy, but terminated it within one week.

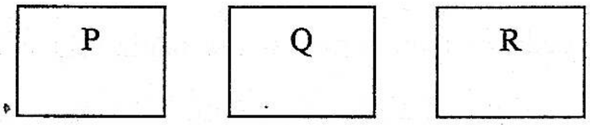
Auction	Upset price	Final bid	Termination time
27 Oct 2003	$5,200	$13,000	5 days
23 February 2004	$5,200	$8,700	6 days
24 June 2004[5]	$5,200	$7,400	7 days

Bidder C

3.5 Bidder C was interested in bidding for two vacant stalls, Stalls P and R. His relative was the tenant of the Stall Q in between:

[4] Stall X was subsequently auctioned on 16 February 2004.

[5] Stall Y was subsequently auctioned on 25 August 2004.



From 25 October 2002 to 24 May 2004, Stalls P and R were let in five auctions. Bidder C took part each time. In the first four auctions, Bidder C succeeded in securing the tenancies for both Stalls P and R. Shortly after, he would terminate the tenancies. In the fifth auction, he failed to get Stall P but obtained the tenancy for Stall R, which he terminated shortly thereafter.

Stall	Auction	Upset price	Final bid	Termination time
P	25 October 2002	$5,700	$9,500	One month
	24 April 2003	$6,700	$9,600	7 days
	27 October 2003	$6,700	$13,500	5 days
	23 February 2004	$6,700	$12,000	7 days
	24 May 2004	$6,700	$6,750	–
R	25 October 2002	$5,300	$9,000	One month
	24 April 2003	$6,300	$11,500	7 days
	27 October 2003	$6,300	$21,600	5 days
	23 February 2004	$6,300	$13,500	7 days
	24 May 2004[6]	$6,300	$14,300	8 days

3.6 When Stall P was first put up for auction on 24 May 2004, no bid was advanced. No one seemed interested and Bidder C did not advance a bid. Towards the end, the auctioneer put Stall P up for auction again in accordance

6 Stall R was subsequently auctioned on 26 July 2004.

with the established procedures announced at the beginning of each auction (para. 2.3). However, Bidder C had by then left. Another bidder secured Stall P with a bid only $50 higher than the upset price.

3.7 Here, FEHD noticed the irregularities in the bidding and tenancies for Stalls P and R. After the first three auctions, a FEHD staff member noted Bidder C's "malicious and tactical bidding practice". To tackle the problem, he obtained approval from an Assistant Director to depart from the existing policy of first going through the IHL selection process in auctioning those two stalls. This shortened the time gap between auctions of the stalls and thus increased the "cost" to Bidder C in keeping them vacant. However, as evident in the last two auctions, the arrangement still failed to deter Bidder C's tactics.

Concluding Comments

3.8 In these cases, we can see how an existing tenant can keep a stall out of reach from competitors for a substantial period:

Stall	**Bidder**	**No. of auction**	**Duration the stall was excised**
X	A	4 times	Over 22 months
Y	B	3 times	Over 10 months
P	C	4 times	19 months
R	C	5 times	Over 21 months

4

OBSERVATIONS AND OPINIONS

4.1 We see auctioning as a fair and open means for opening up business opportunities in public markets. At the same time, it maximises public revenue. Regrettably, the FEHD procedures have loopholes for unethical elements to advance their self interests, causing inequity to competitors and to patrons of public markets.

4.2 The cases cited in Chapter 3 speak for themselves: the current procedures offer opportunities for abuse and exploitation. The three bidders involved evidently had no intention whatsoever of conducting business at the stalls for which they made the top bids. This was particularly clear in the case of Bidder C in respect of Stall P. He was determined to remove all competitors for his relative (doubling the upset price on one occasion), but would not bid (even at the upset price) when he saw no competitor (para. 3.6).

4.3 These individuals (closely related to some existing tenants) have blatantly exploited the flaws in the procedures at the expense of *bona fide*

bidders, patrons or consumers and public revenue.

4.4 We commend the FEHD staff concerned for the attempt to stop the irregularity. Regrettably, it was not successful (para. 3.7).

AWARD OF TENANCY

4.5 Due to the need for priority for IHL holders, a stall becoming vacant will not be available for auction for months (para. 2.14). This in effect means depriving prospective competitors of business opportunities and denying patrons a fuller choice of goods. It also results in less revenue for the public purse.

4.6 We accept the policy for priority to IHL holders. However, we see room for improvement in the arrangements. FEHD should cut considerably the time for processing a vacant stall to be auctioned. It should not need to take three to five months (para. 2.14).

4.7 By natural attrition, the number of IHL holders decreases with the passage of time. Eventually, there will be few remaining IHL holders, who may not be interested in trading in their licences for tenancies of public market stalls. FEHD should, therefore, review the return rate of ballot forms (para. 2.10) and consider when it will be appropriate to revise the policy for priority to IHL holders (para. 2.9). It may, for instance, consider placing the onus on the IHL holders to indicate interest in trading in their licences.

TERMINATION OF TENANCY

Minimum Period

4.8 A tenancy binds FEHD for three years unless the tenant is found to have breached tenancy conditions or committed an offence (para. 2.15). However, it makes it easy for the tenant to quit (para. 2.18): the tenant need not justify premature termination and there is no penalty to deter wilful termination. This is not a fair balance of all the interests concerned: prospective bidders, market patrons and FEHD/Government. Furthermore, it breeds abuse. A tenant can drive competitors away for up to six months at a cost of only one month's rent (para. 2.21).

4.9 For *bona fide* bidders, advancing a bid is an indication of intent to enter into a contract to rent the stall for three years or more. They have to assess the business risk for an affordable bid. To *mala fide* bidders, however, the final bid is just a one-off payment to eliminate competition for long-range returns to their existing stalls. They can, therefore, afford to offer an extravagant bid invariably bound to "win" in an auction.

4.10 FEHD should, therefore, set an appropriate period in the tenancy agreement for market stalls during which termination will attract a penalty payment. To allow flexibility, FEHD should review from time to time the need to provide for genuine exceptional circumstances under which a tenancy

may be terminated prematurely without penalty payment. This should deter *mala fide* bidding.

4.11 FEHD should pay particular attention to cases of early termination, whether within or after the minimum period, and keep proper records for reference.

Notice of Termination

4.12 FEHD should consider requiring a larger deposit or longer notice for premature termination. This would further increase the cost of early termination and should deter abuse. To shorten the period of vacancy, FEHD should also activate the relevant procedures (para. 2.14) as soon as notice is received.

Ban on Bidders

4.13 FEHD should impose restrictions in future auctions on tenants who terminate their tenancies early, as it does for tenants who have breached tenancy conditions or committed offences (paras. 2.15 to 2.17).

4.14 For example, FEHD should disqualify the three bidders in Chapter 3 from bidding for a sufficiently deterrent period.

A NOTE ON DISHONOURED CHEQUES

4.15 Rent and deposit are often paid by cheques. In our experience with some cases with another Government department facing similar situation, dishonoured cheques have been a problem. FEHD has not encountered similar problems. Only a few dishonoured cheques (5 out of 406) were received in the past 12 months. The sums involved were all settled subsequently.

5

RECOMMENDATIONS

5.1 The cases examined show that abuse in auctioning for market stalls should have become evident much earlier. We are surprised that other than a single attempt to tackle a case of blatant abuse, FEHD has not formulated any strategy or action plan to plug loopholes in the procedures or to tighten control over the system.

5.2 Against this background, unethical bidders have taken unfair advantage of the rules laid down by FEHD. It is imperative that FEHD review the arrangements and procedures for auctioning public market stalls.

5.3 On the basis of our observations, The Ombudsman has made the following recommendations to DFEH:

(a) Award of Tenancy

i) in anticipation of the natural attrition of remaining IHL holders, review the return rate of ballot forms: para. 4.7;

ii) consider when it will be appropriate to revise the policy for priority to IHL holders in the selection of vacant market stalls: para. 4.7;

iii) cut considerably the lead time for preparing for auctions of vacant stalls: paras. 4.5 to 4.6;

(b) **Termination of Tenancy**

Minimum Period

i) review the terms of the tenancy agreement to set an appropriate period within which tenancies could be terminated only on a penalty payment: paras. 4.8 to 4.10;

ii) inform bidders of such minimum period and penalty payment for early termination: paras. 4.10 to 4.11;

iii) to allow flexibility, review from time to time the need to provide for genuine exceptional circumstances under which a tenancy may be terminated prematurely without penalty payment: para. 4.10;

iv) keep proper records on tenants who have applied for premature termination: para. 4.11;

v) review the period for notice of termination: para. 4.12;

vi) review the amount of deposit: para. 4.12;

Ban on Bidders

vii) establish mechanism to impose restrictions in future auctions on tenants who have previously applied for premature termination (para. 5.3(b)(iv)): para. 4.13; and

viii) consider sanctions on the three bidders cited in Chapter 3: para. 4.14.

6

FINAL REMARKS

COMMENTS FROM FEHD

6.1 We have studied FEHD's comments on the draft investigation report and where appropriate, incorporated its views and proposed textual amendments.

6.2 FEHD has accepted our recommendations. Implementation of some of them is already underway:

a. On recommendation (a)(iii), FEHD has, since February 2005, already increased the frequency of open auctions of market stalls in the New Territories from once every two months to once a month. In addition, newly available vacant stalls that have been offered for selection by IHL holders in the past 12 months will be put up for open auction immediately if they become vacant again within the 12-month period. From April 2005, selection by IHL holders will be completed within the first six weeks of each quarter, so that

newly available vacant stalls will be released for auction within the same quarter.

b. FEHD aims to implement recommendations (b)(i), (ii) and (vii) in May 2005. It is still working on the timeframe for implementing the other recommendations.

FINAL REMARKS FROM THE OMBUDSMAN

6.3 The Ombudsman is grateful for FEHD's cooperation throughout the investigation, its prompt and positive response to our findings and our recommendations. We particularly appreciate its practically instant introduction of improvement measures. We commend the sincere attitude.

6.4 We will monitor progress of implementation of our recommendations.

6.5 In conclusion, The Ombudsman thanks DFEH and his staff for assistance throughout this investigation.

---- End ----

Office of The Ombudsman
Ref. OMB/DI/127
April 2005

Annex 1
(para. 2.2)

食物環境衞生署

九龍區街市檔位公開競投

本署現訂於二零零五年一月二十五日(星期二)下午二時三十分，在九龍旺角洗衣街 148 號 4 字樓 401 室食物環境衞生署九龍區小販及街市組辦事處舉行公開競投，以出租九龍區街市的空置檔位。有關可供競投的檔位所在街市名稱、檔位編號、可售賣的貨品及每月底租等詳情，請參閱附頁一。

檔位合約一般爲期三年，由二零零五年二月一日起生效。投得檔位人士，須即時繳付二零零五年二月份及三月份租金及相等於一個月租值的按金。

凡年滿 18 歲及通常居於香港的本港居民，如有意競投上述街市檔位，請攜帶本人的香港身份證、適當數額的款項或支票，於上述時間親自前來參加競投。投得檔位人士如持有小販牌照，須於簽署租約時交回本署註銷。

本署有權取消競投某街市檔位或更改每月底租，而不作另行通知。

有興趣競投人士請參閱附頁二街市檔位競投規則及出租條款。空置檔位的位置圖將會在九龍旺角洗衣街 148 號 2 字樓食物環境衞生署九龍區小販及街市組辦事處展示。

本署建議競投人士於參與競投前到有興趣的街市實地視察。競投人士如對有關的空置檔位位置及其他資料有任何疑問，可向有關的街市辦事處職員查詢或致電 2309 2085 及 23092086 向食物環境衞生署九龍區小販及街市組查詢。

此佈

食物環境衞生署

二零零五年一月七日

注意：倘若在公開競投舉行前三小時或預料在該三小時內懸掛或仍然懸掛八號或以上颱風信號或黑色暴雨警告信號，當日的公開競投將予取消，而有關街市競投將會延期在二零零五年一月二十七日(星期四)同一時間及地點舉行。

5年1月25日九龍區街市檔位公開競投資料

附頁一

街市名稱	樓層	檔位編號	售賣貨品	攤檔面積 (平方米)	競投底價 (港幣HK $)
大成街街市	地下	M7	鮮肉	15.48	$6,600
		M8	鮮肉	15.61	$7,500
		M10	鮮肉	15.62	$6,600
		M11	鮮肉	15.2	$6,400
		F44	魚	16.29	$12,500
		W25	蔬菜	4.68	$5,200
		W71	蔬菜	4.68	$5,700
		W81	蔬菜	4.68	$5,200
		W82	蔬菜	4.68	$4,700
		W86	蔬菜	4.68	$5,200
	一樓	S18	生果	4.8	$3,200
		S19	生果	4.8	$3,200
		S119	生果	4.37	$3,200
		S125	生果	4.68	$3,100
		S126	生果	4.68	$3,100
		S127	生果	4.68	$3,100
		S129	生果	5.98	$4,000
		S145	生果	4.38	$2,800
		S147	生果	4.68	$2,800
		S148	生果	4.68	$2,800
		S150	生果	4.68	$2,800
		S151	生果	4.9	$3,000
		S152	生果	4.9	$3,000
		S154	生果	6.02	$3,400
		S155	生果	6.15	$3,500
		S156	生果	6.02	$3,400
		S157	生果	5.13	$3,400
		S158	生果	4.78	$3,200
		S159	生果	4.8	$3,200
		S160	生果	4.78	$3,200
		S161	生果	4.78	$3,200
		S162	生果	4.78	$3,000
		S163	生果	4.78	$3,900
		S42	乾貨(非食物類)	4.68	$3,800
		S111	乾貨(食物類)	4.68	$4,000
		S211	乾貨(食物類)	5.08	$2,600
		S212	乾貨(食物類)	5.06	$2,600
		S219	乾貨(食物類)	5.1	$3,300
		S241	乾貨(食物類)	5.22	$3,000
		S242	乾貨(食物類)	5.22	$2,800
		S244	乾貨(食物類)	6.24	$3,200
		S245	乾貨(食物類)	5.22	$2,600
	二樓	CF10	熟食	16.5	$15,000
油街臨時熟食市場	地下	CF12	熟食	10.38	$8,300

街市檔位競投規則及出租條款

A. 引言

(1) 在符合下述參加資格的情況下，競投的基本規則是把檔位編配予落鎚時出價最高者(此價連續叫出三次)。食物環境衞生署(本署)保留在落鎚前收回檔位以供競投的權利。

B. 參加資格

(2) 除下文第(3)段所指明者，凡年滿十八歲、通常居於香港的人士均可參加公開競投。*(通常居於香港的定義請參閱《入境條例》(第 115 章)第 2 條)*

(3) (a) 除(b)段以下的情況外，凡因違反租約條件或有關法例而被本署終止租約的街市檔位承租人，其競投任何街市檔位的資格將會被取消，由其租約被終止的日期起計，為期一年。

(b) 凡因欠交租金而被終止租約的承租人，在清繳欠交租金之前不得競投任何街市檔位。

(c) 正在分期償還其租約欠交租金的現有承租人，在清繳欠交租金之前不得競投任何街市檔位。

(d) 被禁止競投任何街市檔位的人，其所投得的街市檔位租約，亦會被視作無效。

C. 按金及檔位租金

(4) 投得檔位人士須於落鎚時繳付下列款項：

(a) 相等於一個月租金的按金。如承租人按照租約的相關條款預先以書面通知本署終止租約，並在終止租約生效當日或之前把騰空的檔位交還本署，則可獲發還按金；以及

(b) 一季租金或該季餘下日子的租金。此後，租金須按季預先繳付。

D. 繳付租金及按金

(5) 競投人士投得檔位後須即時在場親自以本人名義登記為該投得檔位的承租人，並以現金或支票繳付上文第(4)(a)及(b)段所述的租金及按金，期票恕不接受。

(6) 競投人士投得檔位後，如自動放棄租用檔位的權利，所繳付的按金概不發還。

(7) 投得檔位人士如因上文第(3)段所述理由而令競投無效，所繳付的按金概不發還。

(8) 如投得檔位人士未能按照上述規定登記為檔位的承租人，其競投會無效，所繳付的按金概不發還，競投主持人有權把檔位「再次推出競投」。

E. 簽訂租約

(9) 投得檔位人士將獲書面通知前往下述辦事處簽署一份為期三年的租約(另有指明者除外):

九龍區街市檔位

九龍旺角洗衣街 148 號 2 字樓

九龍區小販及街市辦事處

(租約範本可在辦公時間內到九龍區小販及街市辦事處或有關的分區辦事處查閱。)

(10) 街市檔位承租人不得出讓、分租、轉讓或以其他方式放棄租約的任何利益或責任。街市檔位準承租人與本署簽訂租約之前，須簽署附件所載的表格，聲明不會出讓、分租、轉讓或以其他方式放棄租約的任何利益或責任。

(11) 投得檔位人士須在上文第(9)段所述函件指定的日期簽訂租約。未能於指定日期起計兩星期內簽訂租約者，有關按金會被沒收，當局亦會收回其租用檔位的權利。獲本署批准延期簽署租約者則除外。

F. 搭建熟食檔檔築物

(12) 如投得熟食檔位人士未獲提供熟食檔構築物，則須嚴格遵從本署所定的設計及尺寸自行搭建構築物。

G. 水電供應

(13) 投得檔位人士需自行與香港電燈有限公司及水務署安排水電供應事宜。

H. 檔位的使用

(14) 本署保留權利，可以不時規定售賣指定貨品的檔位數目，以及更改街市內某個檔位的指定用途。

I. 交還小販牌照

(15) 投得檔位人士須在街市檔位租約生效時，將持有的小販牌照交還食物環境衞生署署長。如租約日後因任何原因被終止，已取消的小販牌照將不獲發還。

J. 防止賄賂

(16) 競投人士請注意，根據«防止賄賂條例»(第 201 章)第七條，任何人士向他人提供利益以誘使或酬謝他人不作競投或曾經不作競投，或以不作競投或曾經不作競投某一檔位為理由向他人索取或收受利益，均屬違法。

K. 備註

(17) 本署轄下的部份街市/熟食中心在進行有關的諮詢後將會裝設空氣調節系統。在完成安裝空調系統後，日後有關空調系統的電費及保養費，將會由各檔戶分攤。此外，在安裝空調系統施工期間，個別攤檔可能會受影響。

(18) 根據過往的競投經驗，某些檔位雖被人投得，但仍會因種種理由令競投無效。此時，競投主持人會即場把檔位重新推出競投。因此，未能投得某檔位的人士應稍事留步，直至投得檔位者已繳付檔位按金及租金，且完成登記手續為止；否則，如該檔位再次推出競投，他們便會錯失出價機會。

—完—

Food and Environmental Hygiene Department

Public Notice on Open Auction of Vacant Market Stalls in Kowloon

An open auction for letting out vacant market stalls in Kowloon will be held at the Kowloon Hawkers and Markets Office at Room 401, 4/F, 148 Sai Yee Street, Mong Kok, Kowloon at 2:30 p.m. on Tuesday, 25 January 2005. Details of the vacant stalls, including names of market, stall numbers, commodities permitted to be sold and monthly upset rents are set out at Annex 1.

Successful bidders will normally enter into a market stall tenancy agreement for a term of 3 years effective from 1 February 2005 upon payment of rent for February and March 2005 and a deposit equivalent to one month of the stall rental.

Any person aged 18 years or above and is an ordinarily resident in Hong Kong and who is interested in bidding for the above market stalls may attend the auction in person at the above time and place, bring along his/her own Hong Kong Identity Card and the appropriate amount of cash or cheque for payment. Successful bidders should surrender their hawker licenses, if any, to the Department for cancellation upon signing of the tenancy agreement.

The Department reserves the right to retract any market stall from the auction or change the monthly upset rent without prior notice.

Bidders may refer to the Auction rules and terms for letting market stalls at Annex II. Plans showing the location of the vacant market stalls offered for bidding will be on display at the Kowloon Hawkers and Markets Office at 2/F, 148 Sai Yee Street, Mong Kok, Kowloon.

Any person who is interested in the vacant market stalls offered for bidding may approach the market office of the respective market or contact the Kowloon Hawkers and Markets Office of the Food and Environmental Hygiene Department at 2309 2085/2309 2086 for details of the vacant stalls or clarification on auction matters. Interested bidder may visit the relevant market for the situation of the vacant stalls offered for bidding before the auction and may approach the respective market office for enquiries and further information.

Food and Environmental Hygiene Department

7 January 2005

Note : In case of typhoon signal No. 8 or above or rainstorm black warning is hoisted 3 hours before the open auction or is hoisted/expected to be hoisted within 3 hours before the auction, the open auction on that day will be postponed to Thursday, 27 January 2005 at the same time and place.

Annex I

Vacant Market Stalls to be put up to Open Auction held on 25.1.2005

rket	Floor	Stall No.	Commodities	Stall Area (Sq. meter)	Monthly Upset Rent (HK$)
Shing Street Market	G/F	M7	Fresh Meat	15.48	6,600
		M8	Fresh Meat	15.61	7,500
		M10	Fresh Meat	15.62	6,600
		M11	Fresh Meat	15.2	6,400
		F44	Fish	16.29	12,500
		W25	Vegetables	4.68	5,200
		W71	Vegetables	4.68	5,700
		W81	Vegetables	4.68	5,200
		W82	Vegetables	4.68	4,700
		W86	Vegetables	4.68	5,200
	1/F	S18	Fruits	4.8	3,200
		S19	Fruits	4.8	3,200
		S119	Fruits	4.37	3,200
		S125	Fruits	4.68	3,100
		S126	Fruits	4.68	3,100
		S127	Fruits	4.68	3,100
		S129	Fruits	5.98	4,000
		S145	Fruits	4.38	2,800
		S147	Fruits	4.68	2,800
		S148	Fruits	4.68	2,800
		S150	Fruits	4.68	2,800
		S151	Fruits	4.9	3,000
		S152	Fruits	4.9	3,000
		S154	Fruits	6.02	3,400
		S155	Fruits	6.15	3,500
		S156	Fruits	6.02	3,400
		S157	Fruits	5.13	3,400
		S158	Fruits	4.78	3,200
		S159	Fruits	4.8	3,200
		S160	Fruits	4.78	3,200
		S161	Fruits	4.78	3,200
		S162	Fruits	4.78	3,000
		S163	Fruits	4.78	3,900
		S42	Dry Goods (Non-food)	4.68	3,800
		S111	Dry Goods (Food)	4.68	4,000
		S211	Dry Goods (Food)	5.08	2,600
		S212	Dry Goods (Food)	5.06	2,600
		S219	Dry Goods (Food)	5.1	3,300
		S241	Dry Goods (Food)	5.22	3,000
		S242	Dry Goods (Food)	5.22	2,800
		S244	Dry Goods (Food)	6.24	3,200
		S245	Dry Goods (Food)	5.22	2,600
	2/F	CF10	Cooked Food	16.5	15,000
treet Temporary d Food Market	G/F	CF12	Cooked Food	10.38	8,300

Auction rules and terms for letting market stalls

A. Introduction

(1) Subject to the Participation Conditions below, the basic rule is that a stall will be allocated to the person making the highest bid (which will be repeated thrice) at the fall of the hammer. The Food and Environmental Hygiene Department (the Department) reserves the right to withdraw any stall from being auctioned before the fall of the hammer.

B. Participation Conditions

(2) Except those persons specified in paragraph (3) below, any person who is 18 years of age or above and is an ordinarily resident in Hong Kong can take part in an open auction. *(please refer to Section 2 of the Immigration Ordinance (Cap. 115) for interpretation of 'ordinarily resident')*

(3) (a) Except for item (b) below, a stall tenant, whose tenancy has been terminated due to breach of tenancy condition or relevant legislation, will be disqualified from bidding for any market stall for one year from the date of termination.

(b) A stall tenant, whose tenancy has been terminated due to non-payment of rent, is prohibited from bidding for any stall until the rentals in arrears are settled.

(c) Any existing stall tenants, who is repaying any rentals in arrears of the tenancy by instalments, is prohibited from bidding for any stall until the rentals in arrears are settled.

(d) A bid by a person, who is prohibited from bidding of any stall, shall become null and void even if the bid is accepted.

C. Deposit and Market Stall Rent

(4) A successful bidder is required to pay at the fall of the hammer: -

(a) a deposit equivalent to one month's rent. This deposit is refundable when the tenant gives notice in writing to the Department and hands over vacant possession of the stall to the Department on or before the effective date of termination of the tenancy in accordance with the relevant clauses in the tenancy agreement; and

(b) a quarterly rent or a rent covering the remaining period of the quarter. Thereafter rents are payable quarterly in advance.

D. Payment of Rent and Deposit

(5) Immediately after bidding the stall, a successful bidder will be required to register in person on the spot in his/her own name as tenant of the stall bid and to pay the deposit and rent as mentioned in paragraphs (4)(a) and (b) in cash or by cheque.

Post-dated cheques will not be accepted.

(6) No refund of deposit will be made if a bidder abandons his tenancy right of the stall after his successful bidding.

(7) No refund of deposit will be made if the successful bid becomes null and void for reason stated in paragraph (3) above.

(8) If the successful bidder fails to take the necessary steps to become the tenant of the stall, the successful bidding will be revoked with no refund of deposit offered and the auctioneer is entitled to put the stall up for "re-auction."

E. <u>Signing of Tenancy Agreement</u>

(9) A successful bidder will be invited by letter to sign a tenancy agreement for 3 years (except otherwise specified) at the following offices:-

- <u>For market stalls in Kowloon</u>

  Hawkers and Markets Office (Kowloon)

  2/F, 148 Sai Yee Street, Mong Kok, Kowloon.

  (A specimen of the tenancy agreement is available for inspection at Hawkers and Markets Office (Kowloon) and respective district offices during office hours).

(10) Market stall tenant shall not assign, sublet, transfer or otherwise part with benefits or obligations of the stall tenancy agreement. Before entering into the stall tenancy agreement with this Department, a successful bidder shall sign a declaration that he/she shall not assign, sublet, transfer or otherwise part with benefits or obligations of the stall tenancy agreement.

(11) A successful bidder will be required to enter into agreement on the date specified in the letter prescribed in paragraph (9) above. Failure to enter into tenancy agreement within two weeks from the date specified, save with the approval of the Department, will lead to forfeiture of the deposit as appropriate and his/her right to the market stall.

F. <u>Erection of Cooked Food Stall Structure</u>

(12) A successful bidder for a stall designated as being used for the sale of cooked food shall provide a structure in strict conformity with the design and dimension specified by the Department if no such structure has already been provided.

G. <u>Supply of Electricity and Water</u>

(13) The successful bidder himself is required to arrange for the supply of electricity and water direct with the Hong Kong Electric Co. Ltd. and the Water Supplies Department.

H. Stall Usage

(14) The Department reserves the right to specify from time to time the number of stalls to be designated for selling the prescribed commodities or to vary the specific purpose or use of an individual stall in a market.

I. Surrender of Hawker Licence

(15) Successful bidders shall surrender to the Director of Food and Environmental Hygiene any hawker licences held by them upon the tenancy of the market stall commences. If for any reasons the tenancy agreement is terminated in future, the cancelled hawker licences will not be returned.

J. Prevention of Bribery

(16) Bidders should note that according to Section 7 of the Prevention of Bribery Ordinance (Cap. 201), any person who offers any advantage to any other person as an inducement to or reward for or otherwise on account of that other person's refraining or having refrained from bidding at any auction, or solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his refraining or having refrained from bidding at any auction, shall be guilty of an offence.

K. Remarks

(17) This Department may arrange for the retro-fitting of air-conditioning system in some of the markets/cooked food center. Please note that the tenants of the market concerned would be required to pay the air-conditioning system recurrent and maintenance costs after the completion of the installation works. In addition, some of the market stalls may be affected during the installation of the air-conditioning systems.

(18) According to the past auction experience, the successful bids in respect of some stalls may become null and void for some specific reasons, and the auctioneer would immediately on the spot put up the stalls for re-auction. Therefore persons who are unsuccessful in bidding a particular stall in the first attempt are requested to wait until the deposit and rent of the stall have been paid and registration of the stall has been completed, or else they will miss the chance of bidding the stall when it is put up for re-auction.

- END -